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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 106

FAIR SHARE ORGANIZATION, INC., ET AL,

Petitioners,

vs.

PHILIP NAGDEMAN & SONS, INC.,

Respondent.

Respondent's Brief In Opposition To Petition For A Writ Of Certiorari To The Appellate Court For The State Of Indiana.

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JURISDICTION.

Although the petitioners state that they are invoking this Court's jurisdiction under 28 U.S.C. §1254(3), they are, in fact, attempting to invoke this Court's jurisdiction under 28 U.S.C. §1257(3).

Under this section of the United States Code, it is respectfully submitted that this Honorable Court has no jurisdiction to issue a writ of certiorari to the Appellate Court of Indiana. Although the petitioners attempted to

raise a constitutional question in the Indiana Appellate Court by their Brief, the Appellate Court did not express an opinion on the constitutional question but, rather, decided the case solely on a state procedural issue. Therefore, the decision of the Indiana Appellate Court rested solely upon a state ground, and under well-established precedents, this Court should not issue a writ of certiorari in the case at bar.

QUESTION PRESENTED.

Whether this Court will issue a writ of certiorari to the Indiana Appellate Court, where the decision of the Appellate Court rested solely upon a state procedural ground, the appeal being affirmed, without any consideration as to the merits of the appeal, because of the failure of the appellants (petitioners here) to follow well-established Indiana appellate procedure.

STATEMENT OF FACTS.

The present litigation was commenced by the filing of a complaint by the respondent, Philip Nagdeman & Sons, Inc., against the Fair Share Organization, Inc. and some individual members for an injunction and damages for tortious interference to the respondent's business propert.. The cause was tried in the Newton Circuit Court and on March 21, 1963, the trial judge issued a permanent injunction restraining the petitioners from picketing the respondent's store of business and granted a damage judgment for $10,000.00. (The petitioners' statement on page 1 of their Petition that the judgment was for $70,000.00 is incorrect, as demonstrated by the trial court's decree printed at pages 25a-26a of the Petition.)

Although the petitioners did raise a question as to their constitutional right to picket under the 14th Amendment by their answer to the respondent's complaint, the trial court, nevertheless, granted the injunction upon finding the following special facts (printed at pages 23a-24a of the Petition):

"X.

In addition to stopping members of the public (of Negro origin) as they were nearing plantiff's premises, and, by various means, warnings, threats and photographing, attempting to prevent them from freely patronizing plaintiff's business, the defendants and each of them, acting through the pickets, exhibited signs and placards containing false, misleading and damaging information and statements discrediting the plaintiff's business reputation in the eyes of its cus-

tomers. Among the representations and placards are the following:

(a) **'Join the Fair Share Organization; help fight Communism.'** None of the owners or employees of Philip Nagdeman & Sons, Inc., were or are members of the Communist party or allied or communist front organizations. The plaintiff firm and its members were not engaged in communistic activities, nor do they sympathize with Communistic activities. Nevertheless, the signs and placards manifested in connection with the picketing constituted an accusation, in the minds of the public, that Philip Nagdeman & Sons, Inc. was or might be a Communistic organization.

(b) **'Americans, help us to blockade Nagdemans'.** The members of the plaintiff firm and its employees are in fact Americans. By soliciting 'Americans' to aid in 'fighting Communism' by blockading Nagdemans, plaintiff company and its employees were and are falsely accused of being unAmerican and communists.

(c) **'Decent Americans, help us to stamp out unlawful discriminatory hiring policies'.** Philip Nagdeman & Sons, at no time engaged in any unlawful discriminatory hiring policy. This sign, coupled with other signs, created and does create the inference that Nagdeman & Sons is unAmerican and indecent and guilty of unlawful conduct.

(d) **'Don't spend your money where you can't work as a salesman'.** This representation falsely accuses the plaintiff firm of being unwilling to hire a salesman. There is no evidence that any person of Negro origin ever applied for a job as a salesman at Philip Nagdeman & Sons, Inc.

(e) **'Nagdeman Brothers has threatened to destroy F.S.O.'** The Nagdeman Brothers did not threaten to destroy F.S.O. The public in East Chicago never heard of 'F.S.O.' until its existence was made known by the defendants at, near, and around the Philip Nagdeman store."

"XI.

As a direct and proximate result of the pickets congregating on the sidewalks at or near and in front of plaintiff's store, the threats, intimidations, photographing, and solicitations, and the false and misleading signs, placards and blockades, plaintiff's business has suffered substantial damage and it will continue unless the acts and conduct of the defendants are enjoined."

In short, the trial court found that the petitioners, under the guise of free speech picketing, were guilty of threatening and intimidating potential customers of the respondent as well as guilty of carrying pickets which contained false, misleading, and damaging information, thereby irreparably damaging the respondent's business reputation.

Under Indiana law, a losing party in the trial court is given 30 days by statute, Burns' Section 2-2403, for the filing of a motion for new trial. Since the judgment of the Newton Circuit Court was entered on March 21, 1963, the time for the filing of a motion for new trial expired for the petitioners on April 20, 1963. No such motion was filed by the petitioners.

Instead, they attempted to raise alleged errors on the part of the trial court by means of a petition for a writ of mandate in the Indiana Supreme Court. The Supreme Court denied the petitioners' petition for a writ of mandate on the sole ground that the errors attempted to be raised could only be considered on a direct appeal. *State of Indiana*

ex rel. Fair Share Organization, Inc., et al. v. *Newton Circuit Court*, (1963) ..... Ind. ....., 191 N.E. 2d 1, printed at pages 6a to 10a of the Petition.

The petitioners then docketed an appeal with the Indiana Appellate Court, by filing their record as well as their Assignment of Errors. Petitioners' Assignment of Errors listed seven specifications of error which allegedly were committed by the trial court. The seven specifications are printed at page 2a of the Petition, as part of the Appellate Court opinion. As can be seen, all of the alleged errors were errors which occurred prior to the time required by statute for the filing of a motion for new trial.

Indiana Supreme Court Rule 2-6 specifically provides for the appellate procedure to be followed in raising errors allegedly committed by the trial court prior to the time required by statute for the filing of a motion for new trial. Supreme Court Rule 2-6 provides in pertinent part:

> "In all cases in which a motion for a new trial is the appropriate procedure preliminary to an appeal, such motion *shall* be filed and *shall* separately specify as grounds therefor *each* error relied upon *however and whenever arising up to the time of filing of such motion*, and an assignment of error on appeal to the effect that the trial court erred in overruling said motion *shall* be the *only* means of raising said asserted errors on appeal. In all other cases and in cases of asserted errors arising subsequent to the filing of the motion for a new trial, such asserted errors may be assigned independently. Adopted as amended June 28, 1960. Effective September 1, 1960, and shall apply only to cases filed on or after such effective date" (Emphasis added.)

Therefore, under this clear and explicit rule, it is necessary for a losing party in the trial court, if he intends to

raise errors allegedly committed by the trial court prior to the time required for the filing of a motion for new trial, to raise said errors by means of such a motion. In short, any alleged error committed by the trial court during the course of the trial must be first raised by a motion for new trial; they cannot be raised by independent assignment on appeal.

On the basis of this rule, the respondent filed a motion in the Indiana Appellate Court to "dismiss or, in the alternative, to affirm the judgment below". The Indiana Appellate Court, in an opinion dated October 22, 1963, affirmed the judgment of the Newton Circuit Court, solely on the ground that the appellants, petitioners here, did not comply with Supreme Court Rule 2-6 by first raising the alleged errors committed by the trial court by means of a motion for new trial. As can be seen from a cursory reading of the Appellate Court opinion, printed at pages 1a-5a of the Petition, the Court did not consider the appeal on the merits, but affirmed the trial court's judgment solely because of the appellants' failure to follow the well-established appellate procedure provided by Supreme Court Rule 2-6.

Therefore, the Appellate Court did not consider any constitutional question, although a question as to the petitioners' right of free speech was raised in their Brief. As stated by the Appellate Court: "Appellee urges, in a motion to dismiss or, in the alternative, to affirm, that since no motion for new trial was filed, *no question is presented in this appeal. With this contention we must agree.*" The Appellate Court later stated: "It becomes apparent that Appellants have failed to comply with the provisions of said rule. [Rule 2-6] Therefore, appellants' assignment of error presents *no justiciable question* to this Court and the judgment of the trial court is affirmed." (Emphasis added.)

ARGUMENT.

I.

THIS HONORABLE COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA, SINCE THE DECISION OF THE APPELLATE COURT DID NOT DECIDE ANY FEDERAL QUESTION BUT RESTED SOLELY AND ENTIRELY UPON A GROUND OF STATE APPELLATE PROCEDURE.

It is a well established and familiar principle that this Court will decline to review a state court judgment which rests on an independent and adequate state ground, notwithstanding the co-presence of federal grounds.

Fay v. *Noia* (1963), 372 U.S. 391, 83 S. Ct. 822;
NAACP v. *Alabama ex rel. Patterson* (1958), 357 U.S. 449, 78 S. Ct. 1163;
Fox Film Corporation v. *Muller* (1935), 296 U.S. 207, 56 S. Ct. 183.

A fortiori, this principle is applicable to the present case, where the decision was not based in part upon a federal ground, but rested solely and entirely upon a state ground of appellate court procedure. As stated by this Court in *Herb* v. *Pitcairn* (1945), 324 U.S. 117, 65 S. Ct. 459, which involved the question of an adequate state procedural ground:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.
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> "*Murdock* v. *Memphis*, 20 Wall. 590, 636, 22 L. Ed. 429; *Berea College* v. *Kentucky*, 211 U.S. 45, 53, 29

S. Ct. 33, 34, 55 L. Ed. 81; *Enterprise Irrigation District v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164, 37 S. Ct. 318, 320, 61 L. Ed. 644; *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 56 S. Ct. 183, 80 L. Ed. 158. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudged federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion. If the Illinois court means to hold that the city courts could not adjudge, transfer, or begin these cases and that no case is pending in its courts at the present time, it is manifest that no view we might express of the federal Act would require its courts to proceed to the trial of these actions." (At p. 463)

This Court's recent decision in *Wolfe* v. *North Carolina* (1960), 364 U.S. 177, 80 S. Ct. 1482 is precisely in point. There, the North Carolina Supreme Court did not reach the merits of the constitutional question duly raised by the parties seeking a writ of certiorari. The North Carolina Supreme Court affirmed the trial court's judgment on the sole ground that the record before it did not present the constitutional questions attempted to be raised. In short, the Court affirmed the trial court's judgment on a state procedural ground.

This Court dismissed the attempted appeal and/or petition for writ of certiorari in *Wolfe*, since the North Carolina Supreme Court decision rested solely upon a state procedural ground. In so holding, this Court stated:

"The judgment before us for review is the judgment which the Supreme Court of North Carolina made *on the record before it, not* the action of the state trial court. *Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.* [Case citations.]

'[*W*]*hen as here there can be no pretence that the* [state] *Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong.*' *Nickel* v. *Cole*, 256 U.S. 222, 225, 41 S. Ct. 467, 468, 65 L. Ed. 900." (At p. 1492; emphasis added.)

* * * * *

"*The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the Constitutional power of the States to define, and here clearly delineated and evenhandedly applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us. That determination is required by principles of judicial administration long settled in this Court, principles applicable alike to all litigants, irrespective of their race, color, politics, or religion.*" (At p. 1493, emphasis added.)

II.

THE INDIANA APPELLATE COURT DECISION WAS BASED UPON A SOUND AND REASONABLE RULE OF INDIANA APPELLATE COURT PRACTICE, APPLICABLE TO ALL APPEALS BEFORE THAT COURT.

Petitioners infer at page 11 of their Petition that the Indiana Appellate Court's decision was based upon a "regulatory measure" which was "employed in purpose or effect to stifle, penalize or curb the exercise of First Amendment rights". Cited are this Court's opinions in *NAACP* v. *Louisiana* (1961), 366 U.S. 293, 81A S. Ct. 1333; *American Communications Association* v. *Douds* (1950), 339 U.S. 382, 70 S. Ct. 674; *United States* v. *Rumely* (1953), 345 U.S. 41, 73 S. Ct. 543; *Shelton* v. *Tucker* (1960), 364 U.S. 479, 81 S. Ct. 247; *Bates* v. *Little Rock* (1960), 361 U.S. 516, 80 S. Ct. 412.

It is respectfully submitted that only a cursory reading of the above cited cases is necessary to realize their irrelevancy to the problem presented by the case at bar. The state and federal statutes involved in these cases were directly concerned with First Amendment rights. For instance, in *NAACP* v. *Louisiana, supra*, a state law required the officers of the NAACP to annually file an affidavit that none of the officers were members of a communist, communist front, or subversive organization.

In the present case, the state law involved, Supreme Court Rule 2-6, does *not* directly or indirectly deal with or have an effect upon First Amendment rights. This Rule is simply a rule of appellate court practice in the State of Indiana, which provides for an appellate procedure which is "no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or

general law". (346 U.S. at 195) As such, it is obvious that the Appellate Court decision, based upon the explicit and clear mandate of Rule 2-6, is not in conflict with the decisions of this Court cited by the petitioners.

Also, the intimation by petitioners at page 9 of their Petition that Supreme Court Rule 2-6 has been applied unequally in a number of cases is totally without foundation. The present Supreme Court Rule 2-6 was amended on June 28, 1960, to become effective on September 1, 1960. Prior to its amendment, many errors could be raised independently on appeal without the necessity of first raising them by means of a motion for a new trial. But since its amendment, the rule is crystal clear that only errors which have arisen subsequent to the filing of a motion for new trial can be raised independently on appeal. All others must be first raised by means of a motion for new trial and then by assigning on appeal as error the overruling of the motion for new trial.

Petitioners cite a number of cases at page 9 in which they allege that independent assignments on appeal—alleging as error conclusions of law entered by trial courts—were considered, notwithstanding Rule 2-6. However, the *Wyatt* and *Sykes* cases were both decided prior to the date Rule 2-6 was even amended. Secondly, petitioners apparently overlook the fact that Rule 2-6 did not become effective until September 1, 1960, and that the Rule states that it "shall apply only to cases filed on or after such effective date." *Superior Trailer*, decided November 3, 1960, was obviously filed prior to the effective date of Rule 2-6.

The *Harshman* case and the *Triplett* case are clearly distinguishable. In *Triplett*, the Appellate Court did hold that no question was presented by the independent assignment because of a failure to present a proper argument, and in *Harshman*, the appellee did not object to the independent assignment of error by the appellants, which the respondent did do in the case at bar by its motion to dismiss.

Finally, in this context, it should be noted that the Supreme Court of Indiana has recently had an opportunity to decide the precise question which the Appellate Court decided in the case at bar and has explicitly held that the Appellate Court's ruling is correct and that a failure to comply with Rule 2-6 requires a dismissal of the appeal or an affirmance without a consideration of the merits. In *Payne* v. *State*, (1962) ..... Ind. ....., 186 N.E. 2d 9, the Supreme Court held that where the appellant failed to assign as error the overruling of a motion for a new trial and attempted, instead, to assign the alleged errors independently on appeal, the appeal would be dismissed. In so holding, the Court stated:

> "Items of alleged error contained in a motion for a new trial present no question on appeal if assigned separately as errors in the Assignment of Errors. Such alleged errors are correctly presented only by the overruling of a motion for a new trial." (At p. 9)

Therefore, it is obvious that there is no substance whatsoever in the petitioners' intimation that Supreme Court Rule 2-6 has been applied unequally in the case at bar, thereby depriving petitioners of a decision on their constitutional question.

III.

THERE IS NO MERIT TO THE PETITIONERS' ARGUMENT THAT THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI FOR THE PURPOSE OF DETERMINING WHETHER OR NOT A LABOR DISPUTE WAS INVOLVED.

The second part of petitioners' argument is completely devoid of legal merit for a number of reasons. First, the question as to whether or not there existed a labor dispute under the Indiana Anti-Injunction Statute, being Burns' Section 40-501, et seq., is not a federal question. Secondly, even if it were a federal question, the Indiana Appellate Court decision is based solely upon an independent and adequate state ground.

Finally, there is, in point of fact, no question under Indiana law as to whether or not a labor dispute was involved under the facts presented by the case at bar. The Supreme Court of Indiana has held in *Fair Share Organization, Inc.* v. *Kroger Company*, (1960) 240 Ind. 461, 165 N.E. 2d 606, (printed at pages 27a-29a of the Petition) that picketing by the petitioners here of a store of the Kroger Company "involved or grew out of a labor dispute as defined in the Indiana statutes." As authority for this ruling, the Indiana Supreme Court expressly relied upon this Court's decision in *New Negro Alliance* v. *Sanitary Grocery Company, Inc.*, (1938) 303 U.S. 552, 58 Sup. Ct. 703. Hence, the Indiana courts have already held that a labor dispute exists under the facts presented by the instant case.

CONCLUSION.

A reading of the opinion of the Indiana Appellate Court, printed at pages 1a-5a of the Petition, demonstrates that the decision was based solely upon a state procedural ground. As such, no federal question was decided; rather the decision rests solely upon an independent and adequate state ground.

Wherefore, respondent respectfully prays that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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